A

PP

v.

MOHD TURMIZY MAHDZIR & ANOR

B

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[CRIMINAL TRIAL NO: 45-06-2003]
24 JULY 2007

C ***CRIMINAL PROCEDURE:*** *Trial - Juvenile offender - Section 83(3) Child Act 2001 - Where offence is committed by a child but a charge in respect of that offence is made only after child attains 18 years - Whether charge should be heard by a court other than a Court For Children*

D ***CRIMINAL PROCEDURE:*** *Sentence - Juvenile offender - Offence under s. 39A(2) Dangerous Drugs Act 1952 - Where offence is committed by a child but a charge in respect of that offence is made only after child attains 18 years - Whether court may impose punishment as prescribed in s. 83(2)(b) and (c) of Child Act 2001 read with sub-s. (3) and s. 91(1)(g) of the Child Act 2001 - Child or youth*
E *cannot be used to shelter from accepting proper responsibility for criminal behaviour - Whether sentence of imprisonment suitable for juvenile offenders - Whether fear that juvenile offender may mix or associate with adult prisoners can prevail or override gravity of offence*

F ***CRIMINAL PROCEDURE:*** *Sentence - Juvenile offender pleaded guilty to offence under s. 39A(2) Dangerous Drugs Act 1952 - Plea of guilty - Facts and circumstances - Whether there were aggravating factors - Extenuating circumstances - Consideration of - Appropriate sentence - Whether a plea of guilty will necessarily lead to any leniency or discount*

G

The accused were originally charged for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the DDA") and punishable under s. 39B(2) of the same Act to be read with s. 34 of the Penal Code. Both the accused pleaded not guilty to
H the charge. Subsequently, the prosecution tendered an alternative charge, an offence under s. 6 of the DDA and punishable under s. 39A(2) of the same Act in addition to the original charge. Both the accused claimed trial to the original charge and pleaded guilty to the alternative charge. Learned counsel for the accused, *inter*
I *alia,* submitted that: (a) as both the accused were below 18 years at the time of the commission of the offence, the court should consider the sentence as provided under the Child Act 2001 ('the Act') and be given a probation order; (b) as the prosecution had

delayed framing of the alternative charge under s. 6 of the DDA until after the accused had attained the age of 18 years, the accused had been denied the opportunity of being tried by the Court For Children and the probation order as provided under the Act; (c) both the accused should be ordered to be placed under probation and not be given custodial sentence; and (d) sentencing the accused to imprisonment will defeat the aim of rehabilitation as they will mix with other adult prisoners.

Held:

(1) Section 83(3) of the Act expressly provides that when the offence is committed by a child but a charge in respect of that offence is made against the child after he has attained the age of 18 years, the charge should be heard by a court other than a Court For Children. Accordingly, both the accused were rightfully and legally tried by this court and not the Court For Children. (paras 8 & 9)

(2) Since the accused had already attained the age 18 years at the time when the alternative charge in respect of the offence under s. 39A(2) of the DDA was framed and tendered to the court, the court had the discretion to impose the punishment as prescribed in para 2(b) and (c) to s. 83 to be read with sub-s. (3) and s. 91(1)(g) of the Act which provides a sentence of imprisonment. (para 11)

(3) On the facts and considering the nature of the offence and the weight of the dangerous drugs, being 419.4 grammes, public interest, the rampancy of the particular nature of the offence, especially involving children and youths and after taking into consideration the welfare reports and the mitigating circumstances, the court found that the probation order as submitted by learned counsel was not an appropriate punishment. Justice of the case demanded that the accused be given custodial sentence. However, having had taken into consideration the welfare reports, the facts as presented on behalf of the prosecution, the accused being first offenders and were children at the time when they committed the offence, their plea of guilty, the court was of the view that it was not appropriate to impose the punishment of life imprisonment. A probation order was also not a suitable and

A appropriate punishment as it would be against public interest and will not reflect the seriousness of the offence. (paras 14 & 15)

(4) As to the fear that the accused may mix or associate with
B adult prisoners, whilst the court was mindful that contact between children and adult prisoners is most undesirable, this factor alone cannot be allowed to prevail or override the gravity of the offence which the accused had been found guilty, public interest and prevalence of crimes which are
C committed by children. However, this observation is subject to facts and circumstances of each individual case. (para 18)

(5) Generally, a plea of guilty is taken into account when imposing sentence and significant reference is made to that consideration in the sentencing process. No plea in mitigation should be
D thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. However, the degree of leniency to be afforded on that consideration will depend upon many different factors. In some cases, a plea
E of guilty will not lead to any leniency or discount. (paras 23 & 25)

(6) Children who are sentenced for grave offences by a court other than the Court For Children may be liable to be sentenced "according to law" rather than in accordance with
F the provisions in the Act which are normally available in the Court For Children. Child or youth cannot be used as a "cloak of convenience" in order to shelter from accepting proper responsibility for criminal behaviour. (para 28)

G *[Both accused sentenced to 10 years' imprisonment and ten strokes of whipping.]*

Case(s) referred to:

Chandra Sekaran Ramiyah & Anor v. PP [2000] 3 CLJ 293 HC ***(refd)***
Channon v. The Queen [1978] 33 FRL 433 ***(refd)***
H *Cameron v. The Queen [2002] 209 CLR 339* ***(refd)***
KWK (a child) v. PP [2003] 4 CLJ 51 CA ***(refd)***
Lee Say & Ors v. PP [1988] 2 CLJ 1555 ***(refd)***
MA (Thanh) [1999] 107 A Crim R 252 ***(refd)***
Mastronardi [2000] 11 A Crim R 306 ***(refd)***
I *Mogan Marimuthu [2002] 2 AMR 2495* ***(refd)***
Nichloss [1991] 57 A Crim R 391 ***(refd)***

Ong Lai Kim v. PP [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376 HC ***(refd)***
PP v. Doraigunaraju Krishna [1993] 3 CLJ 664 HC ***(refd)***
PP v. Govindan Chinden Nair [1998] 2 CLJ 370 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Low Kian Boon & Ors [2006] 3 CLJ 649 HC ***(refd)***
PP v. Samundee Devan Muthu Kerishnan [2006] 3 CLJ 161 HC ***(refd)***
R v. Ball and R v. Sargeant [1974] 60 Cr App R 74 ***(refd)***
R v. Nevison Attorney-General's (Reference No. 22 of 1994) [1995] Crim LR 255 ***(refd)***
R v. Radich [1954] NZLR 86 ***(refd)***
R v. Rushby [1977] 1 NSWLR 594 ***(refd)***
R v. Scarley [2001] 1 Cr App R(S) 86 ***(refd)***
R v. Taziker (Attorney-General Reference No. 36 of 1994) [1995] Crim LR 256 ***(refd)***
R v. Wong, R v. Leung [1999] 48 NSWLR 340 ***(refd)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 270 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Tan Book Yeng v. PP [1972] 1 MLJ 214 ***(refd)***
Tran Hoai Vinh [1999] NSWCCA 109 ***(refd)***
Veerian T Latchmanen v. PP [2001] 7 CLJ 466 HC ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

Legislation referred to:
Child Act 2001, ss. 2(1)(d), 11(5), 83(2)(b)(c), (3), 91(1)(h), (g), 96(b), 97(1)
Criminal Procedure Code, s. 2
Dangerous Drugs Act 1952, ss. 6, 39A(2)(f), 39B(1)(a), (2)
Penal Code, ss. 34, 82, 316, 325

For the accused - Manjeet Kaur; M/s Naran Singh & Co
For the prosecution - Siti Badariah Mohd Yusof DPP

Reported by Amutha Suppayah

JUDGMENT

VT Singham J:

[1] On 4 November 2003, the accused were originally charged for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (herein after referred to as "the DDA") and punishable under s. 39B(2) of the same Act to be read with s. 34 of the Penal Code. Both the accuseds pleaded not guilty to the charge and the case was fixed for hearing.

[2] On 16 August 2006, the prosecution tendered an alternative charge, an offence under s. 6 of the DDA and punishable under s. 39A(2) of the same Act to be read with s. 34 of the Penal Code in addition to the original charge.

The alternative charge reads as follows:

> Bahawa kamu bersama-sama pada 28 November 2001, jam lebih kurang 5.55 pagi di rumah No.2, Jalan Maju Setia 1, Taman Maju, Tronoh, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah ada dalam milikan kamu dadah berbahaya, iaitu Cannabis seberat 419.4 gram, dan oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 (Akta 234) yang boleh dihukum di bawah seksyen 39A(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[3] On the same day on 16 August 2006, both the accuseds claimed trial to the original charge and pleaded guilty to the said alternative charge. As both accused were below 18 years of age at the time of the commission of the offence, on 28 November 2001, this court ordered for a probation report in order to assist the court on the appropriate sentence. The date for the sentence was then postponed pending the probation report. The sentence provided by law under s. 39A(2) of the Dangerous Drugs Act 1952 is as follows:

Sec. 39A (2) reads:

> Every person found guilty of an offence against this act where the offence is not punishable with death and *where the subject mater of the offence is:*
>
> *(f) 50 grammes or more in weight of cannabis*
>
> shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, *be punished with imprisonment for life or for an term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes.* (emphasis added)

[4] On 13 November 2006, the Social Welfare Officer tendered two separate probation reports on both the accused which was marked as encl. 26 for the first accused and the encl. 27 for the second accused.

[5] On the sentence, learned counsel for both the accused *inter alia* submitted briefly as follows:

(1) As both the accused were below 18 years at the time of the commission of the offence on 28 November 2002, the first accused, being 17 years 2 months and 8 days (presently 22 years 2 months and 20 days as on 13 November 2006) and the second accused, being 17 years 4 months and 14 days and (presently 22 years 4 months and 1 day as on 13 November 2006), this court should consider the sentence as provided under the Child Act 2001 (hereinafter referred to as "the Act") and be given a probation order.

(2) As the prosecution had delayed framing of the alternative charge under s. 6 of the DDA until after the accused had attained the age of 18 years, the accused had been denied the opportunity of being tried by the Court For Children and the probation order as provided under the Act.

(3) As the offence of possession of the dangerous drug as per the charge is not a 'grave crime' as defined in s. 2(1)(d) of the Act, both the accused should be ordered to be placed under probation and urged upon this court not to impose a custodial sentence.

(4) Sentencing the accused to imprisonment will defeat the aim of rehabilitation as they will mix and associate themselves with other adult prisoners.

(5) On the other hand, if this court is not minded to impose the sentence as provided under the Act, namely, the probation order, this court should order the whipping as provided under s. 91(1)(g) of the Act.

(6) On the other hand, learned DPP for the prosecution submitted as follows:

(i) the original charge against the accused was for an offence under s. 39(B) of the DDA and the punishment upon conviction is death where the Court For Children has no jurisdiction.

(ii) the offence under s. 39A(2) of the DDA is a grave crime and the court cannot consider a probation order as the punishment provided is imprisonment for life or for a term which shall not be less than five years, and shall also be punishable with whipping of not less than ten strokes.

(iii) Urged upon this court to apply the sentence as provided under the DDA, namely, sub-sec 2 of s. 39A of the DDA.

(iv) However, the whipping to be imposed can be considered under the Act.

(v) Even, if this court were to impose a custodial sentence, the court could still apply the sentencing provisions as provided under the Act as one of the sentence provided under s. 91(1)(h) of the Act which is also punishable with imprisonment.

(vi) Therefore, probation order is not suitable for the nature of the offence committed by the accused.

Decision

[6] Before this court proceeds to consider the appropriate sentence, it is important to consider and critically examine some of the relevant provisions of the Act. The relevant provisions of the Act for the purpose of this case is reproduced and are as follows:

Interpretation:

S. 2(1) In this Act, unless the context otherwise requires -

"grave crime" includes:

(a) the offences of murder, culpable homicide not amounting to murder or attempted murder;

(b) all offences under the Firearms (Increased Penalties) Act 1971 [Act 37];

(c) all offence under the Internal Security Act 1960 [Act 82] punishable with imprisonment for life or with death;

(d) all offences under the Dangerous Drug Act 1952 [Act 234] punishable with imprisonment for more than five years or with death and

(d) all offences under the Kidnapping Act 1961 [Act 365];

"child" -

(a) means a person under the age of eighteen years; and

(b) in relation to criminal proceedings, mean a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code [Act574].

S. 76 "Notwithstanding anything in this Act, the High Court, a Sessions Court and a Magistrate's Court shall have the power to order the detention, in a Henry Gurney School, up to but not after he has attained the age of twenty-one years, of any person who has attained the age of eighteen years but has not attained the age of twenty-one years at the date of making such order."

S. 83(1) Notwithstanding anything contained in any written law relating to the arrest, detention and trial of persons committing any offence but subject to subsections (3) and (4), a child who is alleged to have committed an offence shall not be arrested, detained or tried except in accordance with this Act.

(2) When a child is charge with an offence before a Court For Children and during the pendency of the case he attains the age of eighteen years the Court For Children shall, notwithstanding any provisions of the Act, continue to hear the charge against the child and may:

(a) exercise the power under section 76;

(b) exercise the power under paragraph 91(1)(a), (b), (c), (d) or (g); or

(c) if the offence is punishable with imprisonment, impose any term of imprisonment which could be awarded by Sessions Court.

(3) When an offence is committed by a child but a charge in respect of that offence is made against the child after he has attained the age of eighteen years, the charge shall be heard by a Court other than a Court For Children and that other Court may exercise the power mentioned in paragraph (2)(a),(b) and (c). (emphasis added)

S. 91(1) If a Court For Children is satisfied that an offence has been proved the Court shall, in addition to any other powers exercise able by virtue of this Act, have power to:

(a) admonish and discharge the child;

(b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court;

(c) order the child to be placed in the care of a relative or other fit and proper person:

(i) for such period to be specified by the Court; and

(ii) with such conditions as may be imposed by the Court.

(d) order the child to pay a fine, compensation or costs;

(e) make a probation order under section 98;

(f) order the child to be sent to an approved school or a Henry Gurney School;

(g) *order the child, if a male, to be whipped with not more than ten strokes of a light cane;*

(i) within the Court premises; and

(ii) in the presence, if he desires to be present, of the parent or guardian of the child;

(h) *impose on the child, if he aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2) any term of imprisonment which could be awarded by a Sessions Court.* (emphasis added)

S. 97(1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child. (emphasis added)

[7] At the outset, this court wishes to state that under s. 97(1) of the Act, a child shall not be sentenced to death and that in any event, both the accused were still children at the time when the original charge (encl. 6) was framed and tendered to this

court. Therefore, the contention of the learned DPP that the punishment for the original offence under s. 39(B) of the DDA is death has no relevance to the instant case as the accuseds were children at the time when the offence was alleged to have been committed (see s. 97(1) of the Act).

[8] In the instant case, as stated above it is not in dispute that both the accused were under the age 18 years at the time when the offence was committed and should have been tried by the Court For Children in so far as the alternative charge, being an offence under s. 39A(2) of the DDA which they have pleaded guilty. However, s. 83(3) of the Act, expressly provides that when the offence is committed by a child but a charge in respect of that offence is made against the child after he has attained the age of 18 years, the charge should be heard by a court other than a Court For Children and that other court may exercise the power mentioned in para 2(a),(b) or (c) of s. 83 of the Act.

[9] It is also not in dispute that the alternative charge (encl. 6A) against both the accuseds who were under the age of 18 years at the time when the offence was committed on 28 November 2002 was framed and tendered to this court on 16 August 2006 after they had attained the age 18 years. Accordingly, both the accused are rightfully and legally tried by this court and not the Court For Children.

[10] This court is mindful that the object, intention and spirit of the legislature in introducing the Act is for a person who has attained the age of criminal responsibility as prescribed in s. 82 of the Penal Code and is under the age of 18 years to be tried by Court For Children and the same should not be frustrated. However, as stated above, s. 83(3) of the Act provides the power for this court on the facts and circumstances in the instant case to try both the accused.

[11] Be that as it may, it cannot be overlooked that the punishment to be imposed is solely and exclusively at the discretion of this court and this function cannot be usurped by any other body or tribunal. In the instant case, since the accused have already attained the age 18 years at the time when the alternative charge in respect of the offence under s. 39A(2) of the DDA was framed and tendered to this court on 16 August 2006, this court is given the discretion to impose the punishment

as prescribed in para 2(b) and (c) to s. 83 to be read with sub s. (3) and s. 91(1)(g) of the Act which provides a sentence of imprisonment if the offence which is committed is punishable with imprisonment. In the instant case, every person who is found guilty of possession of 50 grammes or more in weight of cannabis, shall be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes (See 39A(2)(f) of the DDA).

[12] In the instant case, there is no good reason advanced why this court should not impose a custodial sentence as provided under s. 39A(2) of the DDA and to be read with s. 83(2)(c) and (3) of the Act except for the submission of learned counsel that the accuseds should not be allowed to mix or associate with adult prisoners. As both the accused have attained the age of 18 years at the time when alternative charge under s.39A(2) of the DDA was framed and tendered in this court on 16 August 2006, which they had pleaded guilty, this court has the discretion as provided under s. 83(2)(c) and (3) of the Act to impose a custodial sentence as provided under s. 39A(2) of the DDA and considering the nature of the offence and the weight of the dangerous drugs.

[13] In *Chandra Sekaran a/l Ramiyah & Anor v. Public Prosecutor* [2000] 3 CLJ 293, His Lordship Haidar JCA (as he then was) said:

> We do appreciate that it is the duty of the counsel in mitigating for the accused in respect of sentencing to urge the court to consider the interests of the accused. Though the judge must consider the interests of the accused he had nevertheless to consider the interests of the public as well. In other words he has 'to strike a balance, as far as possible, between the interests of the public and the interests of the accused' per Hashim Yeop Sani (as he then was) in *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 258B.

[14] On the facts and considering the nature of the offence and the weight of the dangerous drugs, being 419.4 grammes, public interest, the rampancy of the particular nature of the offence, especially involving children and youths and after taking into consideration the welfare reports and the mitigating circumstances and the submission of the learned DPP, this court finds that the probation order as submitted by learned counsel is not an

appropriate punishment. Justice of the case demands that the accused be given custodial sentence and the sentence as provided under s. 39A(2) of the DDA. (See *Mogan a/l Marimuthu* [2002] 2 AMR 2495 at p. 2059; a decision of this court)

[15] On the other hand, having had taken into consideration the welfare reports, the facts as presented on behalf of the prosecution, the accuseds being first offenders and were children at the time when they committed the offence, their plea of guilty, this court is of the view that it is not appropriate in the circumstances of the instant case to impose the punishment of life imprisonment. However, this court finds that a probation order is also not a suitable and appropriate punishment as it will be against public interest and will not reflect the seriousness of the offence and may convey the wrong message to would-be offenders who are children or youths. This court finds that on the facts and for the reasons stated above and after having considered the mitigation pleas separately and individually against the accuseds, a custodial sentence is most appropriate.(See *Veerian T.Latchmanen v. PP* [2001] 7 CLJ 466; a decision of this court).(See also *K.W.K (a child) v. PP* [2003] 4 CLJ 51 which although is a case in a reference to an application for stay pending appeal, but however, the observation made by the Court of Appeal and the treatment that was accorded to the applicant/child is relevant).

[16] This court has also considered the complaint of learned counsel for the accused that the accused have been denied the opportunity to be tried by the Court For Children and there is a possibility of a probation order if the prosecution had tendered the alternative charge much earlier before the accused had attained the age of 18 years. As to this complaint, this court is of the considered view that complaint has been taken out of context when considering the facts and circumstances of the case. First, the alternative charge was framed and tendered by the prosecution after the learned counsel for the accused had made representations to the Honourable Attorney General Malaysia to reconsider the original charge where representations were made only after the accused who were children at the time when the offence was committed had attained the age of 18 years and secondly, a child who is charged with an offence before a Court For Children and during the pendency of the case he attains the age of eighteen years, the Court For Children shall, notwithstanding any

provisions of this Act, continue to hear the charge against the Child and may under sub. 2(c) of s. 83 of the Act impose any term of imprisonment which could be awarded by a Sessions Court as in the instant case.

[17] This court, with respect, is unable to agree with the submission of learned counsel for the accused that the offence committed by the accused under s. 6 and punishable under s. 39A(2) of the DDA is not a 'grave crime' as defined under s. 2(1) of the Act. The contention of learned counsel for the accused that since the punishment as provided under s. 39A(2) of the DDA prescribes the minimum term of imprisonment as five years whereas s. 2(1)(d) of the Act provides and define 'grave crime' of all offences under the DDA punishable with imprisonment for more than five years, the offence which the accused have been found guilty and convicted is not a 'grave crime' as defined by the Act is misplaced. Section 39A(2) of the DDA expressly provides the punishment *inter alia* with imprisonment for life or for a term which shall not be less than five years. In other words, the law provides for the punishment for the said offence with imprisonment for more than five years ie, with imprisonment for life but gives the discretion to the court to either impose punishment for life or for a term which shall not be less than five years. Accordingly, a purposive interpretation must be given to both the provision under s. 2(1)(d) of the Act to be read with s. 39A(2) of the DDA. Therefore, the contention of learned counsel for the accused that the offence under s. 6 of the DDA which is punishable under s. 39A(2) of the DDA as per charge is not a 'grave crime' as defined in s. 2(1)(d) of the Act cannot be accepted as the correct proposition in law and ought to be rejected when considering punishment to be imposed in the instant case.

[18] As to the fear that the accused may mix or associate with adult prisoners, s. 96(b) of the Act expressly provides that a child aged fourteen or above shall not, if ordered to be imprisoned, be allowed to associate with adult prisoners. In any event, in the instant case, both the accused are now adults, ie, at the time of passing the sentence.It is entirely up to them to have an independent mind of their own if they want to stay clear and clean of any criminal activities in the future and to ensure that they are not easily influenced by other prisoners even if they are

kept together to serve the sentence in the same prison or place as the other adult prisoners who were adults at the time when they committed the offence for which they have been sentenced to imprisonment. On the other hand, this court is mindful that the courts naturally start the observation and recognises that contact between children and adult prisoners is most undesirable but this factor alone cannot be allowed to prevail or override the gravity of the offence which the accused had been found guilty, public interest and prevalence of crimes which are committed by children. (See *Veerian T.Latchmanen v. PP* [2001] 7 CLJ 466; a decision by this court). However, this observation is subject to facts and circumstances of each individual case.

[19] The deleterious effects of dangerous drugs found in the possession of children and youth requires no elaboration as firstly, it is a crime which affects public health and public safety, secondly, it can indeed be the spawn of crimes that may ultimately result in violence or other crimes and no doubt have a shattering effect on public tranquillity and society generally. The message must be made clear that not all first offenders and youth who have pleaded guilty to the offence and appeal to this court for non-custodial sentence will be shown mercy and leniency and granted as a matter of course, as each case will be dependant on its own set of facts and mitigating circumstances. The prevalence in the criminal scene presently and public safety must also be considered as the administration of justice is undeniably a matter of public interest. Therefore, it is legitimate for the public to expect the courts to impose severe sentence to those and including children who commit serious or grave crime which affects public heath and safety, so as to commensurate with the nature of the crime and as a deterrence.

[20] In the instant case, the offence of possession of dangerous drugs, namely cannabis to wit 419.4 grams cannot be treaty lightly as the punishment provided by law pursuant to s. 39A(2) of the DDA itself shows the seriousness of the offence and this court must give effect to the object and intention of the legislative in introducing the enhanced punishment by an amendment. (See *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256. His Lordship Hashim Yeop A. Sani (as he then was) said:

> The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed …". (See *Public Prosecutor v. Low Kian Boon & Ors* [2006] 3 CLJ 649; *Khirul Ihsan Hussain v. PP* [1999] 8 CLJ 309; *PP v. Baharuddin Mustaffa* [2005] 8 CLJ 445)

[21] It is generally accepted that the purpose of deterrent punishment is to deter others as well as to deter that particular criminal, in this case the accused from committing crime again. (See *R v. Ball and R v. Sargeant* [1974] 60 Cr App R 74). In *R v. Radich* [1954] NZLR 86 at p. 87; Fair J said:

> … one of the main purposes of punishment … is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commissions of many that would have been committed if it was thought that the offender could escape without punishment or with only a light punishment, If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine that appropriate amount of punishment.

[22] A very close and critical examination of the Act by this court discloses that the right of a child who is under the age of 18 years and who has attained the age of criminal responsibility as prescribed by s. 82 of the Penal Code ie, above 10 years of age to have the charges tried against him in the Court For Children, subject to s. 11(5) of the Act, is one, not a mere matter of procedure but of statutory right and mandatory and no course of decision can override the statute. However, this court wishes to reiterate that s. 83(3) of the Act provides that when the offence

is committed by a child but charge is respect of that offence is made against the child after the child has attained the age of 18 years, the charge shall be heard by a court other then a Court For Children, in the instant case, the High Court. The reformative theory, especially for children is certainly important but too much stress or emphasis cannot be laid on it to such an extent the tenets of punishment provided by law is altogether vanished. In *Public Prosecutor v. Low Kian Boon & Ors* [2006] 3 CLJ 649. His Lordship KN Segara J at p. 703 said:

> Serious crimes committed by youth seems to be on the rise and wrong signals would be sent to youths and the public at large into believing that the courts would be ever so indulgent to treat them with kid gloves, should they ever be convicted of such crimes, if deterrent sentences are not meted out to impress upon these youths and like-minded offenders that crime does not pay.

In *Tan Bok Yeng v. Public Prosecutor* [1972] 1 MLJ 214 at p. 215 Sharma J said:

> I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly, ornamental and an orthodox instrument of justice, ineffective in its result and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of the punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.

[23] Generally, a plea of guilty is taken into account when imposing sentence and significant reference is made to that consideration in the sentencing process. The courts have said that no plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. (See *Raja Izzuddin Shah v. PP* [1979] 1 MLJ 270; *PP v. Doraigunaraju Krishna* [1993] 3 CLJ 664 at p. 666 and *Sau Soo*

Kim v. PP [1975] 2 MLJ 134 at p. 137 and *Public Prosecutor v. Samundee Devan Muthu Kerishnan* [2006] 3 CLJ 161). In *MA (Thanh)* [1999] 107 A Crim. R 252 where it was said:

> The function of the criminal law and purpose of punishment cannot be found in any single explanation, for it depends both upon the nature and type of the single heading of the protection of society, the protection of the community from the crime. However, a plea of guilty is always a matter for the court to take into account when imposing sentence and significant reference should explicitly be made to that consideration in the sentencing process. (*R v. Cuthbert* [1967] 86 WN (Pt.1) (NSW) 272).

[24] In *Channon v. The Queen* [1978] 33 FRL 433 at p. 451 Deane J said:

> In every case, there is but one ultimate question involved in the determination of sentence. That question is what is the appropriate punishment for the particular offence in the relevant circumstances.

[25] This consideration of the plea of guilty is taken into account because it is usually indication of some remorse, acceptance of responsibility and willingness on the part of the offender to facilitate the course of justice (See *Cameron v. The Queen* [2002] 209 CLR 339). However, the degree of leniency to be afforded on that consideration will depend upon many different factors. In some cases, a plea of guilty will not lead to any leniency or discount. The prevalence of drug offenders is a relevant factor that may be taken into consideration on the general deterrence so as to reflect both the seriousness of the offence and its prevalence. An offender who has pleaded guilty is entitled not as of right to such significant weight to justify a sentence which will have to commensurate to the plead of guilty. Nevertheless, in the instant case, the amount of the dangerous drug involved in the offence is also an important consideration in the sentencing exercise, particularly; the adverse effects of dangerous drugs on the community are related to the quantity available. (See *R v. Wong, R v. Leung* [1999] 48 NSWLR 340, 108 A Crim. R 531).

[26] It is well recognized that generally and for good reason a plea of guilty results in a lesser sentence but that rule is not absolute or automatic. (See *Lee Say & Ors v. PP* [1988] 2 CLJ 1555; *Zaidon Shariff v. PP* [1996] 4 CLJ 441 at p. 446; *PP v. Govindan a/l Chinden Nair* [1998] 2 CLJ 370; *Mogan a/l Marimuthu*

v. PP [2002] 2 AMR 2495 at p. 2509 *R v. Nevison Attorney-General's Reference No. 22 of 1994)* [1995] Crim LR 255). In *R v. Scarley* [2001] 1 Cr App R(S) 86, Court of Appeal (Criminal Division), it was submitted that the appellant was not given any credit for his guilty plea. In dismissing the appeal, Penry-Davey J said:

> In the case of *Reay* [1993] RTR 189, 13 Cr App Rep (S) 533 Jowitt J giving the judgment of the court said this at p. 192 of the former report:
>
> First and foremost, although the court in most cases will give credit for a plea of guilty, the public interest dictates that this is not to be seen as an inflexible rule. There are cases in which, despite the plea of guilty, an offence is of such seriousness … that the public interest requires the imposition of the maximum sentence. If ever there was such a case, this is it. This point alone is sufficient to dispose of the appeal.
>
> Other exceptions to the general rule of credit for plea of guilty were identified in the case of *Costen* [1989] 11 Cr App R(S)182, including those cases where the protection of the public makes it necessary that a long sentence, possibly the maximum, should be passed or in the case of a last minute tactical plea of guilty …
>
> The appeal is accordingly dismissed.

[27] A plea that a custodial sentence would serve no useful purpose where the offender is of good character and has suffered extreme distress as a result of the offence, ignores the deterrent effect of a custodial sentence (See *R v. Taziker (Attorney-General Reference No. 36 of 1994)* [1995] Crim LR 256.

[28] This court is of the view that children who are sentenced for grave offences by a court other than the Court For Children may be liable to be sentenced "according to law" rather than in accordance with the provisions in the Act which are normally available in the Court For Children. It is important to stress that child or youth cannot be used as a "cloak of convenience" in order to shelter from accepting proper responsibility for criminal behaviour. (See *Mastronardi* [2000] 11 A Crim. R 306.) It is important to stress that where young offenders conduct themselves like adults and commit serious or grave crimes; they may attract less leniency in sentencing than their age might otherwise demand.

(See *Tan Book Yeng v. PP* [1972] 1 MLJ 214; *PP v. Low Kian Boon & Ors* [2006] 3 CLJ 649; *Tran Hoai Vinh* [1999] NSWCCA 109 (12 May 1999) *Nichloss* [1991] 57 A Crim R 391).

[29] Be that as it may, in considering and exercising its discretion in passing an appropriate sentence, this court has taken into consideration the following factors:

1. the plea of guilty by the accused on the first reasonable opportunity available when the alternative charge under s. 6 of the DDA was framed and tendered to this court which merits due weight and consideration;

2. the age of the accused, at the time when the commission of the offence was committed;

3. that they had no record of any previous conviction;

4. that both the accused had been under remand since the date of their arrest on 28 November 2001;

5. the plea of guilty has saved much judicial time of a lengthy trial and expenses.

6. the related offence is presently rampant and serious and that public interest demands for a deterrent sentence.

In *R v. Rushby* [1977] 1 NSWLR 594; Street CJ said at 597:

> The judicial discretion underlying the formulation of a sentence must be exercised with due regard to principles of law deducible from authoritative decisions. The philosophy of the Common Law requires adherence to established doctrines and principles that have over years, and in multiple instances, been found to be best calculated to serve the ends of justice. The adjudicative process, if it is to be consistent and ordered, must observe and apply these doctrines and principles and thus must necessarily be attended by a requisite disengagement and detachment. It is cool reason, not passion or generosity that must characterize sentencing, as all other acts of judgment. Although the discretion left to the judge is wide, the doctrines and principles established by the Common Law in regard to sentencing provide the chart that both relieves the judge from too close a personal involvement with the case in hand, and promotes consistency of approach on the part of individual judges.

[30] As to the whipping which is mandatory under s. 39A(2) of the DDA, it may be of some relevance to refer to the case of *Ong Lai Kim v. PP* [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376. In that case, the learned presiding judge of the Sessions Court had imposed whipping being ten (10) strokes of light rotan against the first appellant on the believe that the first appellant was a youthful offender as defined under s. 2 of the CPC where in fact he was 17 years 11 months at the time the offence was committed. Section 2 of the CPC has defined a 'youthful offender' as a child convicted of an offence punishable by fine or imprisonment whose age is above 10 and under the age of 16 years. However, the learned DPP being dissatisfied with the order of light rotan had applied to the High Court to exercise its power of revision under s. 325 read with s. 316 of the Penal Code to alter the nature of whipping to that of whipping for adults. On revision, Zakaria Yatim J (as he then was) ordered the order of light rotan to be substituted with whipping inflicted against adult offender as it was found that the first appellant was not a youthful offender as defined under s. 2 of the CPC as he was 17 years 11 months although the learned counsel for the first appellant had submitted that there was insufficient evidence to show that the appellant was 17 years 11 months.

[31] On the facts and circumstances, in the instant case, the first accused is sentenced to 10 year's imprisonment with effect from the date of his arrest on 28 November 2001 and ordered to be whipped with ten strokes and to be carried out in accordance with s. 91(1)(g) of the Act. The second accused is also sentenced 10 year's imprisonment with effect from the date of his arrest on 28 November 2001 and ordered to be whipped with ten strokes as provided under s. 91(1)(g) of the Act.